

RETALIATION AND WHISTLEBLOWER PROTECTION – The Muddy Pits

HR BEST PRACTICES SUMMIT – May 7, 2015

Presented by:

Robin B. Taylor

Timothy W. Lindsay



Retaliation and Whistleblower Protection

■ What We Will Cover

- Overview of retaliation/whistleblower claim
 - Opposition versus participation
- Federal sources of retaliation/whistleblower claims
- State sources of retaliation/whistleblower claims
- Discussion of the application of those sources to individualized claims
- Tips to avoid potential claims

Retaliation and Whistleblower Protection

■ Overview

- Differences between discrimination claim and a retaliation/whistleblower claim
- Included or excluded in EEOC charge
- Easy litigation trap for employers
- Subjective motive not easy to resolve without trial
- Jury verdicts range from \$25,000 to over \$1,000,000


Retaliation and Whistleblower Protection




■ Federal Sources

- Title VII
- ADEA
- ADA
- 42 U.S.C. §1981
- FMLA
- FLSA
- OSHA (private sector only)

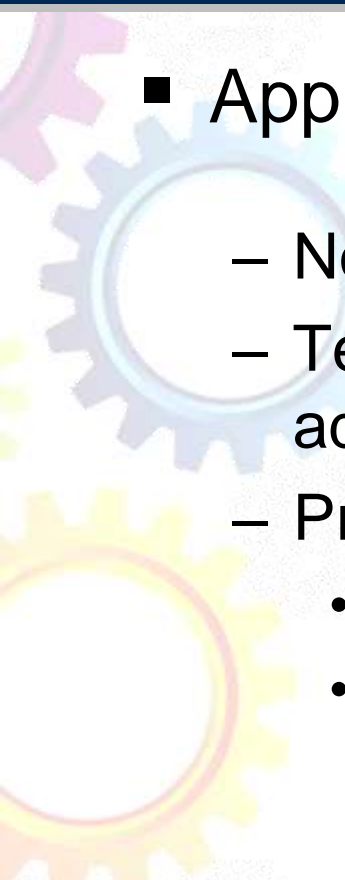
Retaliation and Whistleblower Protection

- 
- Application of the Federal Laws
 - Reporting/Opposition v. Participation
 - Similar Standard of proof
 - Report/complaint of discrimination or wrongdoing
 - Employer knowledge of source of report/complaint
 - Adverse employment decision
 - Decision would not have been made “but for”
 - Subject matter of complaint
 - Who received complaint

Retaliation and Whistleblower Protection

- 
- Application of Federal Laws, cont.
 - An “adverse employment decision or action”
 - Must be materially adverse
 - Effecting term, condition or privilege of employment
 - * termination, demotion, denial of promotion, suspension, pay cut, reduced hours, or increased difficulties in job assignments
 - Usually with actual or potential economic impact on employee

Retaliation and Whistleblower Protection

- 
- Application of Federal Laws, cont.
 - Not limited to workplace conduct
 - Temporal proximity between protected activity and adverse employment decision can be decisive
 - Protection not absolute
 - Not entitled to preferential treatment
 - Legitimate, non-discriminatory reason for decision or action defeats claim

Retaliation and Whistleblower Protection

■ Mississippi Sources

- Fewer in number than federal sources but just as dangerous
- *McArn* exception to the “at-will” doctrine
 - Common law – judicially created
- Miss. Code Ann. §25-9-173
 - One of a few statutes Mississippi legislature has enacted to govern employers and the workplace
 - Whistleblower law applied to an agency or political subdivision of the state – does not extend to private sector employers

Retaliation and Whistleblower Protection

■ Application of Mississippi Laws

– *McArn v. Allied-Bruce Terminix*

- Mississippi Supreme Court – 1992
- Public policy exception the “at-will” doctrine
- Refusal to commit an “illegal act” or reporting of an “illegal act”

– What is required for liability

- Proof of employee refusal to commit or reporting of illegal act
- Employer knowledge of refusal or report
- Adverse employment decision based on refusal or reporting


Retaliation and Whistleblower Protection

- Application of Mississippi Laws, cont.
 - What kind of “illegal act”
 - Criminal sanctions as opposed to mere civil penalties
 - Must be related to the employer’s business
 - Who is liable?
 - Supervisors not liable – only employer

Retaliation and Whistleblower Protection

- Application of Mississippi Laws, cont.
 - Miss. Code Ann. §25-9-173
 - May not affect compensation or employment status because employee testified or provided information to state investigative agency
 - Only one reported decision cites the statute
 - Blackwell v. MS Board of Animal Health* (Miss.Sup.Ct. 2001)
 - Seemingly broader protection than federal laws
 - Includes unwarranted or unsubstantiated reprimands or performance evaluations, as well the employment actions identified under the federal laws

Retaliation and Whistleblower Protection

- 
- Avoiding the Pit – eight essential steps
 1. **Take control of decision-making**
 - partner Human Resources and Management to minimize risks
 2. **Create/maintain proper working environment;**
 - Allow employee to keep distance
 3. **Cleanse the decision-making loop;**
 - Remove accused from decision making process
 4. **Create a direct line of communication for the complaining party to voice concerns;**
 - Designate recipient for further concerns

Retaliation and Whistleblower Protection

■ Avoiding the Pit, cont.

5. Fairly investigate all concerns

- Not attempting to disprove, but to fairly evaluate

6. Monitor

- Periodically reach out to employee/others

7. Take control of the message

- Most important – documentary evidence created

8. Provide feedback to the complaining employee

- Address “all” concerns with a controlled message

Retaliation and Whistleblower Protection



QUESTIONS

Ogletree
Deakins